22376

No. 22,376

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FOOD EMPLOYERS COUNCIL, INC.,
and RETAIL CLERKS UNION, LOCAL 770,

Respondents.

**On Petition
for Enforcement of an Order of the
National Labor Relations Board**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
FRANK H. ITKIN,
IAN D. LANOFF,
Attorneys,
National Labor Relations Board.

FEB 23 1968

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136,

73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*),[1] for enforcement of its order (R. 62-65, 28-41),[2] issued on March 15, 1967, against respondents Food Employers Council, Inc. and Retail Clerks Union, Local 770 (herein, "the Council" and "Retail Clerks," respectively). The Board's decision and order are reported at 163 NLRB No. 58. This Court has jurisdiction, the unfair labor practices having occurred within this judicial circuit. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Respondent Council, since about 1941, has negotiated for its employer-members master collective bargaining agreements with various labor organizations, including respondent Retail Clerks (R. 29; 9, 18, 23). The seven employer-members of the Council involved in this proceeding[3] operate retail food markets in Southern California, and are parties to the

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[1] Pertinent statutory provisions are reprinted *infra*, pp. B 1-3, as Appendix B.

[2] References to the pleadings, reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript of the hearing, reproduced pursuant to Rules 10 and 17 of this Court as "Volume II, Transcript of Record," are designated "Tr." References to the General Counsel's exhibits are designated "G.C. Exh." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Thriftimart, Inc.; Great A. & P. Co.; Crawford Stores; Lucky Stores, Inc.; Hughes Markets; Von's Grocery Co.; and Safeway Stores, Inc. (R. 29-30; 9-10, 18, 23, Tr. 27).

current collective bargaining contract entered into on their behalf by the Council with the Retail Clerks, effective for a five-year term from April 1, 1964 through March 31, 1969 (R. 29, 31; 9-11, 18, 23). The Board found that the Council and Retail Clerks violated Section 8(a)(1), (2) and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively, by applying the terms of this contract – containing a union-security clause – to snackbar employees of the employer-members at a time when the Retail Clerks did not represent a majority of such employees (R. 31-33, 63). The essentially undisputed evidence upon which the Board based its findings is summarized below.

A. Background: the prior efforts of the Retail Clerks to represent the snackbar employees

This proceeding arises as a result of a continuing dispute between the Retail Clerks and the Culinary Workers Union[4] over the right to represent snackbar employees of the Council's employer-members (R. 31, 58-59). During the term of a prior collective bargaining agreement between the Retail Clerks and the Council (effective from January 1, 1959 until March 31, 1964), several of respondent Council's employer-members established snackbars in their stores; the 1959-1964 agreement did not cover snackbar employees (R. 31; 58, G.C. Exh. 2, Tr. 71, 128-129). On May 15, 1963, the Culinary Workers Union filed a petition with the Board seeking to

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[4] Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders Union, AFL-CIO; and Hotel, Motel, Restaurant Employees and Bartenders Union, Local 694, AFL-CIO (the charging parties before the Board in this proceeding).

represent a single unit of snackbar employees at one of two retail supermarkets of an individual employer-member of the Council. (*Piggly Wiggly California Company*, 144 NLRB 708 (Board Case No. 21-RC-8355, September 19, 1963).) The Retail Clerks intervened in that proceeding, and contended, *inter alia*, that the snackbar employees "because of mutuality of interest * * * are properly a part of, and should be included in, the grocery and produce clerks' unit" covered by its contract. The Board, in rejecting this contention, held that the 1959-1964 contract between the Clerks and the Council was not a bar to the petition of the Culinary Workers Union, and found the single store unit of snackbar employees appropriate. The Board pertinently stated (*supra*, 144 NLRB at 711):

> * * * it is clear that the snackbar employees have terms and conditions of employment not shared by, and different from, the grocery and produce clerks. The Board, in the past, has found such employees to have a community of interest apart from grocery and produce clerks and to constitute a separate appropriate unit. [footnote omitted.]

Thereafter, in another proceeding emanating from the rival efforts of the Retail Clerks and Culinary Workers Union to represent the snackbar employees (*Boy's Market, Inc.*, 156 NLRB 105, affirmed *sub nom. Retail Clerks Union v. N.L.R.B.*, 370 F. 2d 205 (C.A. 9)), the Retail Clerks charged that the Council and certain of the employer-members violated Sections 8(a)(1), (2) and (3) of the Act, by extending recognition to the Culinary Workers Union as representative of snackbar employees. This Court, in sustaining the Board's dismissal of these allegations, pertinently stated as follows (*supra*, 370 F. 2d at 208):

> * * * The "snackbar take-out food employees" [at the employer-members' stores involved] were not covered by the Retail Clerks agreement which expired March 31, 1964, and during the 1963 negotiations between the employers and the Retail Clerks, such employees were unorganized and unrepresented. Retail Clerks attempted to organize them from the top by negotiating and concluding a new agreement which in terms covered the "snackbar take-out food employees" without deference to the employees' choice of bargaining representative. The new agreement [*i.e.*, the 1964-1969 contract] excepted "persons presently under a collective bargaining agreement with the Culinary Workers Union" (Joint Board). In the meantime, the Joint Board obtained membership application cards of the "snackbar take-out food employees" in Von's four stores and in Boy's four stores * * *, and the Joint Board entered into a collective bargaining agreement covering these employees * * *.
>
> * * * While the Retail Clerks negotiated with the employers' representative, the Food Employer's Council, Inc., for representation of the unorganized snackbar take-out food employees, the Joint Board did the spade work and obtained evidence of representation and concluded its own agreement with the employers * * * .

The Court, in agreement with the Board that the employer-members did not thereby violate the Act, concluded (*ibid*):

> * * * The rights * * * to self-organization and to bargain collectively through representatives of their

own choosing granted by Section 7 of the Act are the rights of the employees, not of any labor union or the employer, and no labor organization has authority to arrogate unto itself the representation of any unrepresented group of employees without their consent.

B. The extension by the Council and the Retail Clerks of their 1964-69 contract to unrepresented snackbar employees

The current collective bargaining agreement between the Council and the Retail Clerks – effective from April 1, 1964 until March 31, 1969 – covers the employer-members' retail clerks who are engaged in food, bakery, candy, and general merchandise operations. This contract, for the first time, also includes snackbar employees within the unit (R. 31; Tr. 34-35, 39-40, 47-48, 59-60, 71-72, 83-84, 89-90, 96, 115, 119, 121-122, 128-130, G.C. Exh. 3).[5] In addition, the current contract contains union-security provisions, and – as stipulated by the parties – respondents have been maintaining and enforcing these provisions and the collection of union initiation fees and dues with respect to, *inter alia*, the covered snackbar employees (R. 33; Tr. 39-40, 72-74, 110-111, 117-122; G.C. Exh. 3, p. 3, Art. II, Par. A.)

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[5] The contract expressly excludes only those snackbar employees "presently under a collective bargaining agreement with the Culinary Workers Union, or persons employed in a complete restaurant" (R. 56, G.C. Exh. 3).

Respondent Retail Clerks Union, admittedly, did not represent a majority of the snackbar employees included in this collective bargaining agreement at the time the contract was executed (R. 31; Tr. 34-35, 39, 47, 53, 59-60, 63-65, 68-69, 71, 90, 115, 123, 128-129). On the contrary, the Culinary Workers Union represented a majority of snackbar employees at various stores of the Council's employer-members (R. 31; 47-48, 53-64, 129, *supra*, pp. 4-6).[6]

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board, in agreement with the Trial Examiner (R. 62-65, 28-41), concluded that respondent Council and respondent Retail Clerks Union violated Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and (b)(2) of the Act, respectively, by their admitted application and enforcement of the terms of the 1964-1969 collective bargaining agreement — including union-security provisions — to the employer-members' snackbar employees not otherwise covered by a collective bargaining agreement, at a time when the Retail Clerks did not represent a majority of the employees. In reaching this conclusion, the Board rejected respondents' contention that the snackbar employees constituted an "accretion" or addition to their existing bargaining unit

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[6] As stipulated before the Board (Tr. 115): "[Respondent Union] did not represent a majority of snackbar employees * * * as distinguished from the overall group of employees covered by the [1964] contract."

(R. 32; Tr. 39, 115, R. 53).[7] The Board concluded, in substance, that the snackbar employees should therefore be afforded the opportunity to determine for themselves whether they want to be represented by a bargaining agent and, if so, to choose that agent, rather than have such determinations made for them by the Council and the Retail Clerks.

The Board's order requires the Council and the Retail Clerks to cease and desist from the unfair labor practices found, and from in any like or related manner infringing upon the Section 7 rights of the employees. Respondent Council is directed to refrain from giving any force or effect to the 1964-1969 collective bargaining agreement, insofar as it has been extended to snackbar employees. Likewise, respondent Retail Clerks is directed to cease and desist from acting as the collective bargaining representative of the snackbar employees, unless and until that Union shall have been duly certified by the Board as such representative, and to refrain from seeking to enforce the agreement insofar as snackbar employees are concerned. Affirmatively, the Council is ordered to withdraw recognition from the Retail Clerks as collective bargaining representative, pursuant to the terms of the 1964-1969 agreement, to the extent that such agreement purports to cover snackbar employees of employer-members of the Council, unless and until certified by

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[7] As shown *infra*, pp. 10-12, the Board found that the terms and conditions of employment of the snackbar employees are different from those of the retail clerks included in the unit, and the snackbar employees "have a community of interest apart from them" (R. 32).

the Board as the employees' representative.[8] In addition, the Council is further directed to notify the snackbar employees that they need not join or maintain membership in respondent Union as a condition of employment, and to post appropriate notices. The Retail Clerks Union is similarly directed to post appropriate notices at its offices and meeting halls and to provide signed notices for posting at the food markets of the employer-members of respondent Council (R. 33-41, 63-65).[9]

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[8] The Board's order, however, does not require the Council or its members to vary or abandon any wage, hour, seniority, or other substantive feature of the employer-members' relations with snackbar or other employees which have been established in the performance of the current collective bargaining agreement, or prejudice the assertion by the snackbar employees of any rights they may have thereunder.

[9] Respondent Council has filed no answer to the Board's petition for enforcement of this order, in accordance with Rule 34(4) of the Court, and has advised the Court, by letter dated December 20, 1967, that it does not intend to participate in these proceedings.

ARGUMENT

THE BOARD PROPERLY FOUND THAT RESPONDENT COUNCIL AND RESPONDENT RETAIL CLERKS VIOLATED SECTIONS 8(a)(1), (2), AND (3) AND 8(b)(1)(A) AND (2) OF THE ACT, RESPECTIVELY, BY APPLYING THE TERMS AND CONDITIONS OF THEIR 1964-1969 COLLECTIVE BARGAINING AGREEMENT TO THE EMPLOYER'S SNACKBAR EMPLOYEES.

An employer and a union violate the Act when the union is recognized as the collective bargaining representative of employees, a majority of whom it does not represent. *International Ladies' Garment Workers Union v. N.L.R.B.*, 366 U.S. 731, 737-739; *Local Lodge 1424, I.A.M. v. N.L.R.B.*, 362 U.S. 411, 412-414; *Local 620, Allied Industrial Workers of America v. N.L.R.B.*, 375 F. 2d 707, 711 (C.A. 6); *Retail Clerks Union, Local 770 v. N.L.R.B.*, 370 F. 2d 205, 208 (C.A. 9); *N.L.R.B. v. Masters-Lake Success, Inc.*, 287 F. 2d 35 (C.A. 2); *N.L.R.B. v. Revere Metal Art Co.*, 280 F. 2d 96, 100 (C.A. 2), cert. denied, 364 U.S. 894. Under this general principle, however, an employer may recognize an incumbent representative of a unit of his employees as the representative of an additional group of employees where the new group is merely an "accretion" to the existing bargaining unit.[10] See, *Borg-Warner Corporation*, 113

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[10] An "accretion" is, by definition, merely the addition of new employees to an already existing group. When the new employees are added and comingled with existing employees so as to lose their separate identity, their inclusion in an existing unit follows as a matter of course. Questions arise only when the new group remains identifiable, for example, as when they constitute a separate department or store or plant. In these situations, as shown hereinafter, the Board will examine the entire picture before permitting the new employees

NLRB 152, 153, enforced *sub nom. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. N.L.R.B.*, 231 F. 2d 237, 243 (C.A. 7), cert. denied, 352 U.S. 908; *Masters-Lake Success, Inc.*, 124 NLRB 580, enforced 287 F. 2d 35, 36 (C.A. 2); *Dura Corp.*, 153 NLRB 592, enforced *sub nom. Local 620, Allied Industrial Workers v. N.L.R.B.*, 375 F. 2d 707, 710-711 (C.A. 6).

In the instant case, it is undisputed that, at the time the Council and the Retail Clerks entered into their 1964-1969 collective bargaining agreement, the Retail Clerks did not represent a majority of the newly covered snackbar employees (*supra*, pp. 6 - 7). Indeed, the rival Culinary Workers Union concededly represented snackbar employees of certain employer-members of the Council, who were parties to this 1964-1969 contract (R. 31). Thus, unless the Board unreasonably refused to regard the employers' snackbar employees (not covered by a contract with the Culinary Workers Union) as an accretion to the existing retail clerks' unit, the recognition which respondent Council extended to respondent Retail Clerks violated, with respect to the Council, Section 8(a)(1) and (2), and with respect to the Retail Clerks, 8(b)(1)(A) and (2) of the Act (App. B., *infra*, pp. B 1-3). In addition, respondents, by extending the union-security provisions of their contract to these employees, further violated Section 8(a)(3) and 8(b)(2). We show

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10 (continued)

to be swallowed up by the bargaining representative of the employer's other employees without expressing their wishes in the matter. When such inclusion is permitted, on the basis of criteria developed by the Board and approved by the courts (cases cited above), the new group is an "accretion" to the old group.

hereinafter that the Board, in rejecting respondents' contention that the snackbar employees constituted an accretion to the existing unit (R. 63, 53, 32), acted reasonably and well within the discretion accorded it in such matters.

A. The Board properly concluded that the snackbar employees were not an accretion to the existing unit of retail clerks

The Board's resolution of the "issue as to what unit is appropriate for bargaining," posed in representation proceedings under Section 9 of the Act, "involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed." *Packard Motor Car Company v. N.L.R.B.*, 330 U.S. 485, 491. A party challenging a Board unit determination "bears the burden of showing that the Board has abused its discretion." *N.L.R.B. v. Schill Steel Products, Inc.*, 340 F. 2d 568, 574 (C.A. 5); and see, *N.L.R.B. v. B. H. Hadley, Inc.*, 322 F. 2d 281, 284 (C.A. 9); *Foreman & Clark, Inc. v. N.L.R.B.*, 215 F. 2d 396, 405-406 (C.A. 9), cert. denied, 348 U.S. 887. "That this is not a representation case does not change the role of the Board. * * * Here, the question was whether the boundaries of a valid bargaining unit could be contractually extended by an employer and a union to cover employees * * * who never indicated their support of that union." *Local 620, Allied Industrial Workers v. N. L.R.B., supra,* 375 F. 2d at 711. The Board, in resolving this issue, traditionally considers such factors as "the existence of separate administrative units, the geographical distance between [the groups of employees involved], their lack of significant functional integration, the contractual differences governing the two groups of workers, the failure of any substantial interchange of employees to take place" and,

thus, whether there is "a sufficient community of interest demonstrated between" the new group of employees and the existing unit "to justify the former being represented, without their acquiescence, by the same bargaining agent." *Local 620, Allied Industrial Workers v. N.L.R.B., supra,* 375 F. 2d at 711; *N.L,R.B. v. Masters-Lake Success, Inc., supra,* 287 F. 2d at 36; *International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America v. N.L.R.B., supra,* 231 F. 2d at 243. The Board's application of these criteria to the particular facts of a case will not be disturbed on review unless its action is shown to be "arbitrary or capricious" (*ibid.*).

In the instant case, the Board applied the foregoing criteria to the essentially uncontradicted evidence, and found (R. 32):

> * * * snackbar employees are engaged in a different type of work than that performed by the retail clerks in the food markets, * * * there is no interchange between such employees, * * * the snackbars are located outside the check stands of the markets and these are physically separated from the area where the other retail clerks work; * * * the snackbar employees are under separate supervision; * * * they may not work split shifts; * * * premium rates of pay for Sunday work are not applicable to them. It is thus clear that the terms and conditions of employment of snackbar employees are different from those of the retail clerks and that they have a community of interest apart from them * * *.

The record amply supports these findings. Thus, as stipulated by the parties (R. 32; Tr. 129-130, 133), the snackbar employees prepare food which, in some cases,either is consumed at tables or counters on the premises or, in other cases, is wrapped by the employees for consumption off the premises.[11] In either case, all such purchases are paid for at the snackbar cash register, since these facilities are situated outside of the supermarkets' "check stands." There are no other employees in the supermarkets who perform this type of work, and there is no "interchange of snackbar" and other store workers.[12] Immediate authority over the snackbar operation is vested in a "department manager," who, in turn, is ultimately responsible to the store manager (Tr. 130). In addition, an examination of the respondents' current 1964-1969 collective bargaining agreement reveals differences in hours, wages and working conditions between snackbar and retail clerk employees. Thus, split shifts are permitted for snackbar employees, but prohibited for all other store workers (R.32; G.C. Exh. 3, Art. IV, Par. G 2. Art. VI. Par. S1, 2). A guarantee of 8-hours work at a Sunday premium rate of pay, applicable to all retail clerks

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[11] In addition to their normal counter-service duties, snackbar employees must clean dishes and cooking utensils, and perform housekeeping functions attending the daily preparation and dispensing of food (Tr. 138-139).

[12] In "emergency" situations, "clerks, helpers, or box boys will relieve the snackbar employees" (Tr. 130). As the personnel manager for Hughes Supermarkets acknowledged before the Board (Tr. 148-149), these emergencies "hardly" ever arise in the employer's larger stores, and "may" occur "once in thirty days" in the smaller stores. On these rare occasions. the market employees chosen to substitute for snackbar employees must receive specialized training before performing snackbar functions (Tr. 143-144, 148). In addition, "on occasion," snackbar employees have moved to other jobs "within the store" (Tr. 130).

(except part-time clerks' helpers), is not available to snackbar personnel (R. 32; G.C. Exh. 3, Art. VI, Par. S1, 2). The current agreement further provides that future wage increases for snackbar employees shall either be the same as those negotiated for "clerks' helpers" "or those negotiated by the hotel and restaurant industry, whichever are greater" (R. 32; G.C. Exh. 3, Art. VI, Par. S1, 2). Moreover, snackbar employees are furnished meals, while other store employees are not (R. 52; G.C. Exh. 3, Art. VI, Par. S1, 2).

Under the circumstances, the Board reasonably found, as it has in the past (*Piggly-Wiggly California Company*, 144 NLRB 708, 711), "that the snackbar employees have terms and conditions of employment not shared by, and different from, the grocery and produce clerks [and, therefore,] such employees have a community of interest apart from" the existing unit of retail clerks. Accordingly, respondent Council and respondent Retail Clerks had no right to extend the terms of their collective bargaining agreement so as to deprive these employees of their right to choose freely a bargaining representative.[13]

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[13] Before the Board (R. 59-60), respondents relied upon the Board's holding in *The Great A. & P. Tea Co.*, 140 NLRB 1011. As stated in that case (*id.* at 1021-1023): "Whether or not a particular operation constitutes an accretion or a separate unit turns, of course, on the entire congeries of facts in each case." There, the Board – in balancing "the right of employees to select a bargaining representative against the concomitant statutory objective of maintaining established stable labor relations" – found that the new department had "been physically established, operated, and administered as an integral part of the Company's food store operations and not as an autonomous and separate enterprise" (*ibid.*). The balance struck on the facts presented in that case does not render the Board's conclusion in this case "an abuse of discretion." *Local 620, Allied Industrial Workers v. N.L.R.B.*, *supra*, 375 F. 2d at 711.

B. The violation found here is not contingent upon a showing that the Culinary Workers Union has made a rival claim to represent the snackbar employees

Respondents argued before the Board (R. 55-60) that, in order to find a violation here, their conduct must contravene the principle established in *Midwest Piping and Supply Co.*, 63 NLRB 1060. This doctrine prohibits an employer from recognizing or contracting with one of two rival union claimants at a time when their claims give rise to a real question concerning representation, and requires that a union's right to be recognized first be determined under the election procedures provided in the Act.

Respondents, in relying upon this principle, misconceive the nature of the violation found here. It is a violation of the Act, as shown *supra*, pp. 10-12, for an employer to conclude a collective bargaining agreement with a minority union regardless of the presence of rival union claims. See, *International Ladies' Garment Workers' Union v. N.L.R.B.*, 280 F. 2d 616, 620, aff'd, 366 U.S. 731; *Retail Clerks Union, Local 770 v. N.L.R.B.*, *supra*, 370 F. 2d at 207-208. Indeed, as this Court recently stated in *Retail Clerks Union, Local 770, supra*, at 208, "* * * no labor organization has authority to arrogate unto itself the representation of any unrepresented group of employees without their consent." The Section 7 rights of employees "to bargain collectively through representatives of their own choosing" or "to refrain from any or all such activities" are not contingent upon rival claims made by competing unions.

CONCLUSION

Accordingly, it is respectfully submitted that the Board's order should be enforced in full.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
FRANK H. ITKIN,
IAN D. LANOFF,
Attorneys,
National Labor Relations Board.

February 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX A

Table of Exhibits Presented Pursuant to Rule 18(f) of the Rules of this Court

(Numbers are to pages of reporter's typewritten transcript)

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1 (a) through (g)	6	6	6
2	44	44	44
3	45	45	47

RESPONDENTS' EXHIBITS

1	185	196	196
2	213	216	216

CHARGING PARTIES' EXHIBITS

1 (a) through (c)	157	172	173

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteeed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided:* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further:* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

CASILLAS PRESS, INC.
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